

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISAAC COLLIER, JR.,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 184478

Recorder's Court

LC No. 94-004460

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE D. SCOTT,

Defendant-Appellant.

No. 184480

Recorder's Court

LC No. 94-004460

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Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a joint jury trial in the Detroit Recorder's Court, defendant Isaac Collier, Jr. was convicted of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, and unarmed robbery, MCL 750.530; MSA 28.798. Defendant Clarence Scott was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Collier was sentenced to the mandatory term of life imprisonment without the possibility of parole for the conviction of felony murder and ten to fifteen years for the conviction of unarmed robbery. Collier's conviction of second-degree murder was vacated by the trial court at sentencing. Scott was sentenced to the mandatory terms of life imprisonment without

the possibility of parole for both convictions of felony murder and first-degree murder, and two years for felony-firearm. Defendants now appeal as of right. We vacate Scott's conviction of felony murder, and affirm the remaining convictions and sentences of both defendants.

This case arises out of the shooting death of Elwin Lilley on April 2, 1994 near Metro Airport in Romulus. Defendants attempted to steal money from the victim while he was in his parked car in the parking lot of a McDonald's restaurant. Scott, who had a sawed-off shotgun in the waistband of his pants, put the gun to the victim's head and demanded money. After the victim started his car and attempted to drive away, Scott shot him in the head. Both defendants then took some items from the car. Collier then ran to a gas station and stole a getaway car.

### **No. 184480**

Defendant Collier raises two issues on appeal. He first contends that there was insufficient evidence to be convicted as an aider and abettor of felony murder and that he is entitled to a new trial because the trial court erred in failing to instruct the jury on the requested cognate lesser offense of accessory after the fact. We do not find either issue to require reversal.

### **I**

First, Collier argues that there was insufficient evidence to convict him of felony murder as an aider and abettor. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Id.*, p 568.

Taken in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction of felony murder as an aider and abettor. In his police statement, defendant Collier admitted that he and Scott planned to steal money from someone. Collier also stated that Scott got out of the car, "stuck the gun on the man," and demanded the man's money. Scott then shot the victim when the victim attempted to drive away. Collier was also able to perfectly describe the gun to the police (a "sawed-off, one shot, 410 gauge" gun). Under these circumstances, there is sufficient

evidence that Collier had the requisite intent; that is, that these defendants created a very high risk of death or great bodily harm with knowledge that such was the probable result. See *id.*, p 572.

## II

Defendant Collier next argues that the trial court erred in failing to give his requested instruction on the cognate lesser offense of accessory after the fact. In determining whether to give an instruction on a cognate lesser offense, the record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial court, if requested, must instruct on it. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). However, there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.*

This Court has recently held that the offense of accessory after the fact is not a cognate lesser offense of murder. *People v Perry*, 218 Mich App 520, 533; 554 NW2d 362 (1996). However, this is in contrast to *People v Usher*, 196 Mich App 228, 234; 492 NW2d 786 (1992), where this Court stated that the crime of accessory after the fact can be a cognate lesser included offense of aiding and abetting first-degree murder. In following *Perry*, there is no error in the trial court's refusal to instruct on accessory after the fact because it is not a cognate lesser offense of murder.

Even were we to apply *Usher* to this case, we would find no error. A person is an accessory after the fact when, after obtaining knowledge of the principal's guilt after the completion of the crime, that person renders assistance in an effort to hinder the detection, arrest, trial, or punishment of the principal. *Usher, supra*, p 232. In this case, Collier did not obtain knowledge of Scott's guilt *after* the completion of the crime. Collier and Scott worked together to steal money from someone. Collier waited in a car while Scott attempted to rob the victim of his money and then shot him as he attempted to drive away. Although Collier did steal a getaway car after the shooting, it is clear that Collier and Scott participated in an armed robbery together which resulted in the shooting death of the victim. This is not a situation where Collier merely rendered assistance to Scott to elude the crime scene.

Accordingly, the trial court did not err in denying Collier's requested instruction on accessory after the fact.

## No. 184480

On appeal, defendant Scott raises five issues. He contends that the trial court abused its discretion when it denied his motion for severance or a separate jury, that the court erred in denying his motion to quash the information on the felony murder count, that the court erred in denying his motion to suppress evidence as the fruit of an illegal search, that his right to confrontation was violated when the codefendant's statement was read to the jury, and that his convictions of both felony murder and first-degree murder violate double jeopardy. We agree that the convictions of both felony murder and first-degree murder violate double jeopardy and we vacate the conviction of felony murder. However, we affirm Scott's remaining convictions and sentences as we do not find any other issue to require reversal.

### III

Defendant Scott first argues that the trial court abused its discretion in denying his motion for a separate trial or, alternatively, for a separate jury. The decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). The use of a separate jury is a partial form of severance to be evaluated under the standard applicable to motions for separate trials. *Id.*

In his motion for severance, defendant requested a separate trial because codefendant Collier had made an incriminating police statement implicating Scott and exculpating himself in the shooting. It was Scott's contention that Collier's attempt to exculpate himself at the expense of inculpating Scott would deny Scott a fair trial. Therefore, it appears that Scott was arguing that he would be prejudiced by the admission of Collier's police statement as the statement would not be admissible against Scott if Collier did not testify at trial. See *id.*, p 346; *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993).

We find no abuse of discretion based on the record before us. Even if Scott was concerned that the unredacted police statement of a nontestifying codefendant might be improperly admitted against him, this was simply not the case presented to the trial court at the time of the motion. There was every indication that Collier would testify at trial, and would thus be subject to cross-examination. However, it was not until the third day of trial, after the motion for severance was made, that trial counsel informed the court that Collier would not testify. At the time that Scott moved for the severance, all parties believed that Collier would testify and there was no claim of mutually exclusive or antagonistic defenses. Further, a confession is not antagonistic for purposes of determining whether to sever a trial where, as here, the confession of a codefendant incriminates both the codefendant and the defendant. *People v Jackson*, 179 Mich App 344, 349; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1991).

Therefore, Scott had not made any showing that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced and that severance was necessary to rectify the potential prejudice. *Hana, supra*, p 346. Accordingly, the trial court did not abuse its discretion in denying Scott's motion for severance.

### IV

Defendant Scott next argues that the trial court erred in denying his motion to quash the felony murder charge. Scott argues that but for the confession of Collier, there was no evidence of an enumerated felony to support a bindover on a felony murder charge. We review the circuit court's affirmance of the district court's decision to bind over defendant on the felony murder charge for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Meredith (On Remand)*, 209 Mich App 403, 410; 531 NW2d 749 (1995).

If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. MCR 6.110(E). There must be some evidence from which each element of the crime may be inferred. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996).

Here, there was probable cause to believe that defendant Scott committed the crime of felony murder. The parties stipulated that the victim died from a gunshot wound to his left cheek. Venita Campbell testified that on the day of the crime, Scott told her that he had gotten into some trouble at the airport and that he had to kill someone in the course of a robbery. Yolanda Pezzat, who was at the McDonald's restaurant at the time of the shooting, testified that she heard a loud pop and saw Scott with a gun standing by a gray car. Dean Patton also testified that he saw two men rummaging through a Buick in the McDonald's parking lot. Patton saw one of the men walk up to the car, pull out a gun, and stick the gun into the driver's side window. Patton also saw the two men take things from the car, fill their pockets, and transfer those items to another car. After the two men left, Patton saw a dead man in the Buick.

Accordingly, the district court did not abuse its discretion in binding over defendant Scott for trial on the charge of felony murder. The evidence established probable cause to believe that Scott committed the crime of felony murder.

## V

Defendant Scott next argues that the trial court erred in denying his motion to suppress evidence as fruit of an illegal search of his apartment. A trial court's ruling on a motion to suppress evidence is reviewed de novo. *People v Goforth*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 191325, issued 3/14/97), slip op, p 2, citing *Ornelas v United States*, 517 US \_\_\_, 116 S Ct 1657; 134 L Ed 2d 911, 919-920 (1996); *Thompson v Keohane*, 516 US \_\_\_, 116 S Ct 457; 133 L Ed 2d 383 (1995). The trial court's factual findings are reviewed under the clearly erroneous standard of review. MCR 2.613(C).

In order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Exceptions to the warrant requirement include: (1) searches incident to an arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *Id.* The trial court ruled that defendant Scott had no "personal proprietary interest" in the apartment building, and that the landlord, as the owner, had the right to enter the premises and allow the police to search the apartments.

In this case, defendant Scott's apartment was searched by the police without a warrant. The police seized two live .410-gauge shotgun shells and other documents. The owner of the apartment building, Saben Spearman, testified at the evidentiary hearing that defendant lived in apartment number eight in the building and that defendant was the manager of the building. Contrary to the trial court's

ruling, there can be no dispute that defendant, as the resident of apartment eight, had a reasonable expectation of privacy in the apartment. Further, it is well-settled that an owner may *not* give permission to the police to search a tenant's premises unless

the tenant's contract so provides. *Stoner v California*, 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964); *People v Chism*, 390 Mich 104, 134; 211 NW2d 193 (1973). There being no contractual evidence that the landlord could give permission to the police to search defendant's apartment, the landlord could not consent to the search of the apartment. Indeed, we note that the landlord testified that he did not consent to the police officers searching defendant's apartment and that the police entered by kicking down the door.

Therefore, the trial court erred in denying defendant's motion to suppress. There is no evidence in the record that defendant, or anyone with authority, consented to the search of the apartment. However, we find that the admission of the evidence at trial, which was very limited evidence (two live shotgun shells and some documents showing that defendant lived at the apartment's address), was harmless error. In other words, we are convinced beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Here, there was ample eyewitness testimony that defendant Scott shot the victim. One witness also saw both defendants rummaging through the car and removing items from it. Further, shotgun pellets were recovered near the body of the victim and they matched the shells recovered from defendant's motel room. Under these circumstances, where the improperly seized evidence was very minimal and could not have contributed to defendant's conviction, we find that the error in admitting the two live shotgun shells was harmless beyond a reasonable doubt.

## VI

Defendant Scott next argues that his right to confrontation was denied when his codefendant's unredacted police statement was read to the jury and the codefendant subsequently chose not to testify. Defendant claims that this constitutes a violation of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). However, a close inspection of the lower court record reveals that there was no violation of *Bruton* in this case.

In *Bruton*, the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when the nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In the present case, during the third day of trial, defense counsel objected to admitting codefendant Collier's police statement as evidence against Scott because the statement directly incriminated Scott as well. However, Collier's counsel stated that Collier was going to testify at trial and would thus be available for cross-examination by Scott. It was not until after this discussion, later the same day, that Collier ultimately decided not to testify. At the time that counsel informed the court that Collier would not testify, Scott did not renew his objection to the fact that the statement had been admitted. Since the trial court believed that Collier was going to testify at trial at the time that Scott raised his objection to admitting Collier's police statement against him, we cannot conclude that the trial court erred in allowing the police statement at the time the objection was raised.

Moreover, even if we were to consider that a *Bruton* violation occurred in this case, we would find the error to be harmless beyond a reasonable doubt. See *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Collier's statement was not admitted until the end of the prosecutor's proofs. Before the statement was admitted, there was ample testimony that Scott had killed the victim. Yolanda Pezzet heard a loud pop and identified defendant as the man standing next to the gray car with a gun in his hand. Three other witnesses, while not positively identifying defendant as the man with the shotgun, all described a man wearing a black trench coat as the shooter. Dean Patton also identified Scott as the man wearing the black trench coat and that Scott had a gun.

Evidence seized from the motel room where the defendants had been staying also confirmed their actions in the killing. The police seized live .410-gauge shotgun shells, and pellets taken from the body of the victim were of the same size and weight as the pellets taken from the live shells found. There was additional testimony from Sue Rucker that she saw Scott with the sawed-off shotgun. Moreover, Scott had told Lisa Campbell that he had been involved in a murder, and he told his girlfriend, Venita Campbell, that he had gotten into some trouble at the airport. Specifically, Venita told the police that Scott had told her that he had to kill a man that he was trying to rob. Venita later retracted this testimony at trial, but she had made this statement to the police.

With respect to the statement itself, this is not a situation where Collier denied all criminal responsibility and shifted all blame onto Scott. In the statement, Collier admitted that he and Scott were out to "take some money from someone." Collier also stated the "Six-Nine" (referring to Scott) "stuck the gun on the man and told him to give him his money." The man attempted to drive off, and Scott shot him. Although Collier squarely places the actual shooting on Scott, there was ample evidence presented by the prosecutor before the statement was admitted that Scott was the shooter. Had the statement never been admitted, there was still overwhelming evidence that Scott was the shooter in this case.

Accordingly, we find that there was no *Bruton* violation in this case because the trial court had been informed that Collier was going to testify when Scott objected to the introduction of Collier's police statement. Moreover, even if there was technically a *Bruton* violation, we find that the admission of the statement against Scott was harmless beyond a reasonable doubt because the properly admitted evidence of guilt was overwhelming and the prejudicial effect of the codefendant's statement was so insignificant by comparison.

## VIII

Last, defendant Scott argues that his convictions of both felony murder and first-degree murder arising out of the same killing violate the protection against double jeopardy. The prosecutor concedes error and we agree with defendant's contention. The appropriate remedy is to vacate the conviction of felony murder. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992). Accordingly, we remand for the limited purpose of allowing the trial court to amend the judgment of sentence to indicate that defendant Scott's conviction of felony murder is vacated. In all other respects, his convictions of first-degree murder and felony-firearm are affirmed.



Affirmed in Docket No. 184478. In Docket No. 184480, we affirm the convictions of first-degree murder and felony-firearm, vacate the conviction of felony murder, and remand for proceedings consistent with this opinion.

/s/ Myron H. Wahls

/s/ Harold Hood

/s/ Kathleen Jansen